LIBRARY
SUPREME COURT, U. S.

FILED
DEC 6 1968
JOHN F. DAVIS, CLERK

No. 811

In the
Supreme Court of the United States
OCTOBER TERM, 1968

JOSEPHINE MISKUNAS,
Petitioner,

vs.

UNION CARBIDE CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MYRON J. HOCK
401 Lafayette Building
South Bend, Indiana
Counsel for Petitioner

DAVID W. MERNITZ and
DUTTON, KAPPES & OVERMAN
710 Guaranty Building
Indianapolis, Indiana
Of Counsel for Petitioner

The Scheffer Press, Inc., 118 South Clinton Street, Chicago, Illinois

TABLE OF CONTENTS

		PAGE
I.	Opinion Below	2
II.	Jurisdiction of this Court	2
III.	Question Presented for Review	3
IV.	Constitutional Provisions Involved	3
V.	A Concise Statement of the Case Containing Facts Material to the Question Presented for Review	4
VI.	Reasons Relied Upon for the Allowance of the Writ	6
VII.	Appendix	1a

Table Of Authorities

Cases

Boden v. Del-Mar Garage (1932), 205 Ind. 59, 185 N.E. 860 5

Brown v. Kistleman (1912), 177 Ind. 692, 98 N.E. 637 5

Burk v. Anderson (1952), 232 Ind. 77, 109 N.E. 2d 407 5

Glona v. American Guarantee and Liability Insurance Company (1968), 391 U.S. 73 ..... 7, 9

Hitaffer v. Argonne Co. (D.C. Cir., 1950), 183 F. 2d 811, cert. den., 340 U.S. 852 8

Igneri v. Cie. de Transports Oceaniques (2nd Cir., 1963), 323 F. 2d 257 ..... 3, 8

Leffler v. Wiley (Ohio, 1958), 239 N.E. 235 9

PAGE

Levy v. Louisiana (1968), 391 U.S. 68 ..... 7, 9

Miller v. Sparks (1963), 136 Ind. App. 148, 189 N.E. 2d 720 5

Millington v. Southeastern Elevator Co., Inc. (Court of Appeals, N.Y., 1968), 239 N.E. 2d 897 6

STATUTE

Title 28, United States Code, Section 1254(1) 2

CONSTITUTIONS

Fifth Amendment to the Constitution of the United States 3

Fourteenth Amendment to the Constitution of the United States 4

RULE

Rule 19(b) of the Rules of the Supreme Court of the United States 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

JOSEPHINE MISKUNAS,

Petitioner,

vs.

UNION CARBIDE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable The Supreme Court of The United States:

Your Petitioner, Josephine Miskunas, respectfully prays that a writ of certiorari issue to review and reverse the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this cause on July 8, 1968, as to which rehearing was denied on September 10, 1968; and in support of her petition, Petitioner represents as follows:

I.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit was filed July 8, 1968. It is reported at 399 F.2d 847. A verbatim copy is found in the Appendix hereto (page 1a).

On July 23, 1968, Petitioner (Plaintiff-Appellant) filed her Petition for Rehearing by the Court In Banc.

On July 24, 1968, the Court of Appeals directed Respondent (Defendant-Appellee) to file an Answer to the Petition for Rehearing. This was done on August 5, 1968.

On September 10, 1968, the Court of Appeals denied Petitioner's (Plaintiff-Appellant's) Petition for Rehearing by the Count In Banc. There was no written opinion; a verbatim copy of the Order is found in the Appendix hereto (page 13a).

II.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1) and Rule 19(b) of the Rules of this Court, to:

(A) Reverse the judgment of the United States Court of Appeals for the Seventh Circuit, which Court has by its judgment herein decided an important question of federal law which has not been, but should be, explicitly settled by this Court, and has done so in a way in conflict with applicable decisions of this Court.

(B) Resolve a conflict between the decision of the United States of Appeals for the Seventh Circuit in this case and the decisions of the United States Court of Ap-

peals for the Second Circuit in *Igneri* v. *Cie. de Transports Oceaniques* (2 Cir., 1963), 323 F.2d 257, *cert. den.* 376 U.S. 949 and the District of Columbia Circuit in *Hitaffer* v. *Argonne Co.* (D.C. Cir., 1950), 183 F.2d 811, *cert. den.*, 340 U.S. 852, on the constitutional question in issue here.

(i) Date of Judgment Sought to Be Reviewed.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 8, 1968. Rehearing was denied on September 10, 1968 (Appendix, pages 1a to 12a and 13a, respectively).

(ii) Statutory Provision Conferring Jurisdiction.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

III.

QUESTION PRESENTED FOR REVIEW.

Does the State of Indiana deny equal protection of the laws to a married woman by enforcement of a rule of law which holds that she may not recover civil damages for loss of her husband's consortium, while in situations otherwise identical Indiana law confers upon a married man the right to recover for loss of his wife's consortium?

IV.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in

> actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

V.

A CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTION PRESENTED.

The case originated in the United States District Court for the Southern District of Indiana, Indianapolis Division, where it was filed by the plaintiff, now Petitioner, Josephine Miskunas. Her complaint is in four paragraphs or counts, each alleging in substance that she has lost her husband's society, comfort and companionship (*i.e.*, "consortium") as a proximate result of the torts of defendant (now Respondent) Union Carbide Corporation because, on July 14, 1966, her husband was severely injured in an industrial explosion at Respondent's plant in Kokomo, Indiana, where he was performing services for an independent contractor. (His personal action is still pending).

Jurisdiction of the District Court was invoked by reason of diversity of citizenship and the requisite amount in controversy. Petitioner (and her husband) are citizens of the State of Indiana. Respondent is a New York corporation admitted and qualified to do business in the State of Indiana.

On motion of defendant (Respondent), the District Court dismissed Petitioner's complaint in its entirety, holding that the law of the State of Indiana does not grant to a married woman the right to recover damages for loss of her husband's society, companionship and the other intangible interests collectively characterized as "consortium". The District Court relied upon two decisions of the Supreme Court of Indiana (*Brown* v. *Kistleman*, (1912), 177 Ind. 692, 98 N.E. 637 and *Boden* v. *Del-Mar Garage* (1932), 205 Ind. 59, 185 N.E. 860), gave some weight to an *obiter dictum* contained in another decision (*Burk* v. *Anderson* (1952) 232 Ind. 77, 109 N.E.2d 407), and alluded to an opinion of the Appellate Court of Indiana (*Miller* v. *Sparks* (1963), 136 Ind. App. 148, 189 N.E.2d 720).

The constitutional issue here presented, though raised and briefed in the District Court, was neither considered nor decided by that Court.

Thereafter, Petitioner brought her appeal to the United States Court of Appeals for the Seventh Circuit. There, a three-member panel affirmed the judgment of the District Court, one judge dissenting (Appendix, pages 6a to 12a). Petitioner's Petition for Rehearing by the Court In Banc was denied (Appendix, page 13a).

VI.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The substantive law of the State of Indiana may for present purposes be taken as denying to a married woman the rights Petitioner sued for in the District Court. Throughout the litigation the parties have agreed that the substantive law of the State of Indiana protects a husband's counterpart rights in respect to recovery of damages for loss of his wife's consortium.

By way of Respondent's briefs in the Court of Appeals, some confusion entered the case as to whether a wife's interest in preservation of her husband's consortium is identical to a husband's counterpart interest. The majority opinion of the Court of Appeals resolved that question in Petitioner's favor (as, of course, did the dissenting opinion). Any doubts concerning the identity of consortium interests will be resolved upon review of the careful opinion of the Court of Appeals of the State of New York in *Millington* v. *Eastern Elevator Co., Inc.,* decided July 2, 1968, reported in full at 239 N.E.2d 897.

Recovery was denied by the Court of Appeals for the Seventh Circuit in the instant case upon the narrow and entirely speculative groun. that effectuation of the Equal Protection Clause might "result in a double recovery." The thrust of this rationale rests upon some questionable statistics somehow thought to make an otherwise irrational classification constitutionally permissible. (Appendix, page 4a). The Court of Appeals implicitly conceded that, but for the dispositive weight given the statistical analysis (which, as urged in Petitioner's Petition for Rehearing by the Court In Banc, is nowhere relied upon in any of

the decisions of the Indiana courts), the discrimination prevailing under Indiana law would be constitutionally repugnant in that, absent such alleged rational classification, the denial of equal protection which does in fact occur would be impermissible.

Conflict With Applicable Decisions of This Court.

Subsequent to the decision of the United States Court of Appeals for the Seventh Circuit, Petitioner brought that Court's attention to this Court's decisions in *Glona* v. *American Guarantee and Liability Insurance Company* (1968), 391 U.S. 73 and *Levy* v. *Louisiana* (1968), 391 U.S. 68, decided last Term. Holding that application of the Louisiana Wrongful Death Act so as to discriminate against a decedent's illegitimate children runs afoul of the Equal Protection Clause, *Glona* and *Levy* clearly establish that the purported rational basis for a discriminatory classification, which in fact does deny equal protection of the laws, must rest upon sound policy and, even then, be framed so as to protect a legitimate *state* interest in remedying an evil of sufficient concern to justify the deprivation which results.

Petitioner respectfully submits that the purported reasons of policy relied upon by the Court of Appeals in this case, bottomed as they are in conjectural concern for an unclassified group of private individuals—civil tortfeasors —are not in any way a rational basis for the classification here involved, a classification that effectively and absolutely denies to all married women in the State of Indiana rights which continue to be fully granted to married men.

When it is observed that many administrative devices exist (*e.g.*, compulsive joinder of a wife's consortium claim with her injured husband's personal claim) which in the

workaday affairs of litigation successfully preclude any appreciable risk of "double recovery," it will be found that the supposed rationale for the rule here challenged can not survive a rigorous constitutional scrutiny of the kind this Court gave the discriminatory classification derived from the language of the Louisiana Wrongful Death Act.

Conflicts Among the Circuits.

The opinion of the United States of Appeals for the Seventh Circuit in this case is in conflict with the decision of the United States Court of Appeals for the Second Circuit in *Igneri* v. *Cie. de Transports Oceaniques* (2nd Cir., 1963), 323 F.2d 257. The result reached in *Igneri* was forced by *statutory* analysis, but it is clear that, following the landmark decision in *Hitaffer* v. *Argonne Co.* (D.C. Cir., 1950), 183 F.2d 811, *cert. den.,* 340 U.S. 852 (with which the Seventh Circuit's decision herein is also in fundamental conflict), the Second Circuit would have reached the opposite result in common law context. That decision necessarily would have rested upon equal protection grounds.

In the instant case there are no statutory obstacles. Indeed, if the law of the State of Indiana did not protect the consortium rights of a husband, this Petitioner's claims would not be of constitutional dimension. This is precisely why the Second Circuit found in *Igneri* that the wife of a longshoreman could not recover consortium damages: under the statutory structure, the husband of a longshorewoman would have had no such rights.

Likewise, it is apparent that the Indiana courts have formulated, and the Court of Appeals in this case has perpetuated, a discriminatory rule of law which the legislative authority of the state could not validly enact. Ob-

serving that Article I of the Constitution of Ohio is substantially identical to Article I, Section 23, of the Constitution of Indiana, we note the following definitive statement in *Leffler* v. *Wiley* (Ohio, 1968), 239 N.E.2d 235 at 236:

> If a statute were to affirmatively create such a right in a husband and yet deny it to a wife, such a classification based on sex alone would violate Article I of the Constitution of Ohio and the Fourteenth Amendment to the Constitution of the United States. The common-law distinction between husband and wife in regard to consortium is equally based upon an unreasonable, discredited concept of the subservience of the wife to her husband. The courts should not perpetuate in the common law a discrimination that could not constitutionally be created by statute.

Accordingly, the decision of the United States Court of Appeals for the Seventh Circuit in this case is in all significant ways in direct conflict with the decisions of the Second and District of Columbia Circuits.

The question here presented is an important question of federal law which has not been, but should be, explicitly settled by this Court. The decision of the United States Court of Appeals for the Seventh Circuit is in fundamental conflict with the applicable decisions of this Court in *Glona* v. *American Guarantee and Liability Insurance Company* and *Levy* v. *Louisiana.*

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Seventh Circuit entered herein on July 8, 1968, and adhered to on September 10, 1968, and that upon review said judgment be reversed and this cause be remanded to the United States District Court for the Southern District of Indi-

ana, Indianapolis Division, for disposition as the District Court may direct.

JOSEPHINE MISKUNAS,
Petitioner

Myron J. Hack

By: MYRON J. HACK
401 Lafayette Building
South Bend, Indiana
Counsel for Petitioner

DAVID W. MERNITZ and
DUTTON, KAPPES & OVERMAN
710 Guaranty Building
Indianapolis, Indiana
Of Counsel for Petitioner

APPENDIX

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

September Term, 1967 — April Session, 1968

No. 16482
Josephine Miskunas,
Plaintiff-Appellant,
v.
Union Carbide Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

July 8, 1968

Before MAJOR, *Senior Circuit Judge,* and SCHNACKENBERG and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In this diversity action, plaintiff sued to recover for damages resulting from injuries suffered by her husband, Edward Miskunas, on July 14, 1966. He was in one of defendant's buildings in Kokomo, Indiana, when a Model 20-20 Burton Mixer was being used to blend certain materials, resulting in an explosion that inflicted severe burns on Miskunas. As a result of his injuries, plaintiff was allegedly deprived of her husband's "society, services, companionship and consortium" for which she sought $200,000 in compensatory damages and $1,000,000 in exemplary and punitive damages.

Relying upon three Indiana cases,[1] the District Court held that under Indiana law a wife has no cause of action

[1] *Boden* v. *Del-Mar Garage,* 205 Ind. 59, 185 N.E. 860 (1933); *Brown* v. *Kistleman,* 177 Ind. 692, 98 N.E. 631 (1912); *Miller* v. *Sparks,* 136 Ind. App. 148, 189 N.E.2d 720 (1963).

for loss of her husband's services, companionship or consortium. Therefore, the defendant's motion to dismiss the complaint was granted.[2]

In *Boden* v. *Del-Mar Garage,* 205 Ind. 59, 185 N.E. 860, 863 (1933), the Supreme Court of Indiana stated that a husband cannot maintain a negligence action in that State for the loss of consortium unless connected with the loss of his wife's service, for the real basis of recovery is for the loss of her service. Under a 1950 Virginia statute, the Fourth Circuit has held that apart from mental anguish, a negligently injured wife can only recover for the tangible items of damage sustained by her. *Carey* v. *Foster,* 345 F. 2d 772 (4th Cir. 1965). Both cases recognize that a State may properly deny a spouse a recovery for intangible damages.

As recently as 1963, the Appellate Court of Indiana adhered to the rule that in that State a wife cannot sue a tort-feasor for loss of her husband's consortium. *Miller* v. *Sparks, supra,* note 1. Apparently the last time the question was directly before the Supreme Court of Indiana was in 1952 in *Burk* v. *Anderson,* 232 Ind. 77, 109 N.E. 2d 407. There it was decided that only the husband can sue for loss of consortial rights. Even though Judge Gilkison favored the rule that the consortium rights of each spouse are coextensive, a majority of the Supreme Court of Indiana refused to agree with his view. Twelve years later, the Indiana Supreme Court cited *Miller* v. *Sparks, Burk* v. *Anderson* and *Brown* v. *Kistleman, supra,* note 1, with approval, stating that " 'if the wife is permitted a separate recovery for her loss of consortium resulting from * * * injuries [to her husband], there is, in effect, a double recovery for

---

[2] Unless she has a right to sue for loss of consortium, plaintiff does not dispute the District Court's holding that under *Boden* v. *Del-Mar Garage, supra,* note 1, she cannot state a cause of action for "mental anguish" without alleging that she suffered some physical injury. No such allegation is contained in the complaint.

the same matter'." *McDaniel* v. *McDaniel*, 245 Ind. 551, 558, 201 N.E. 2d 215 (1964).

Two states in this circuit have adopted the rule that the wife should be permitted to sue for loss of consortium.[3] Although this rule has much to commend it, we are bound by the unbroken line of Indiana authority to the contrary. *Seymour* v. *Union News Co.*, 217 F. 2d 168, 169 (7th Cir. 1954); *Sestito* v. *Knop*, 297 F. 2d 33, 34 (7th Cir. 1961). In accordance with the views of some of the Commentators, numerous jurisdictions continue to deny recovery to a wife. See *Igneri* v. *Cie. de Transports Oceaniques*, 323 F. 2d 257, 260-261 (2d Cir. 1963), certiorari denied, 376 U.S. 949. Therefore, we would not be warranted in speculating that the Indiana Supreme Court will allow a recovery by a wife for loss of consortium resulting from a negligent injury to her husband, when again presented with that question. Cf. *Hulburt Oil & Grease Company* v. *Hulburt Oil & Grease Company*, 371 F. 2d 251, 254-255 (7th Cir. 1966), certiorari denied, 386 U.S. 1032.

The plaintiff contends that the Indiana rule constitutes a violation of the Equal Protection clause of the Fourteenth Amendment to the Federal Constitution because it denies a wife a cause of action in a situation where a husband has one. This contention was successful in *Owen* v. *Illinois Banking Corp.*, 260 F. Supp. 820 (W.D. Mich. 1966), and *Karczewski* v. *Baltimore and Ohio Railroad Company*, 274 F. Supp. 169 (N.D. Ill. 1967), but unsuccessful in *Lunow* v. *Fairchance Lumber Company*, No. 66-122 Civil (W.D. Okla. 1967), affirmed on other grounds, 389 F. 2d 212 (10th

---

[3] *Dini* v. *Naiditch*, 20 Ill.2d 406, 170 N.E.2d 881 (1960), and *Moran* v. *Quality Aluminum Casting Co.*, 34 Wis.2d 542, 150 N.W.2d 137 (1967). They followed the landmark decision of *Hitaffer* v. *Argonne Co.*, 183 F.2d 811 (D.C. Cir. 1950), certiorari denied, 340 U.S. 852.

Cir. 1968).[4] The Equal Protection clause does not ordinarily prevent a state from making a classification dependent upon one's sex. *Gruenwald* v. *Gardner,* 390 F. 2d 591 (2nd Cir. 1968). As Justice Frankfurter stated in upholding a Michigan law prohibiting women (with certain exceptions) from bartending:

> "The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, * * *. The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards."
>
> *Goessaert* v. *Cleary,* 335 U.S. 464, 466.

Under the Equal Protection clause, a discriminatory rule of state law "will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland,* 366 U.S. 420, 426.

Because a husband can recover for lost earnings, Indiana could reasonably conclude that it would be undesirable to give the wife an action that might permit double recovery. Since 87.8% of married men are employed and only 34.4% of wives are employed,[5] Indiana could justifiably discriminate in this respect between the spouses. Indiana could infer that more often in a wife's suit than a husband's, the jury would award her duplicating damages for some of the

---

[4] As the District Court pointed out in the *Lunow* case, "Nor can it be said in the light of the overall marriage relationship, the basic differences between the spouses and the different rights and responsibilities as between the spouses that invidious discrimination and an unreasonable classification is inherent in allowing the husband to recover for loss of consortium and recognize no such cause of action in the wife." (Memorandum opinion, p. 9.)

[5] These are the latest statistics available here and are for March 1964. U. S. Department of Labor, Bureau of Labor Statistics Reprint #2457.

same elements of injury. See Restatement of Torts, Section 695, Comment A. Allowing the husband to recover for the lost household services of the wife would not engender double recovery, for the wife cannot recover for those unpaid services. (If employed and injured, she can of course recover for her lost earnings.) As Judge Friendly pointed out in the *Igneri* case, *op. cit.* at p. 264, "it is doubted that the trial court's instructions and its own power, combined with that of the appellate Court * * * to review verdicts for excessiveness would suffice to remove the danger of double recovery." In criticizing the granting of a consortium action to the wife, Chief Justice Schaefer stated as follows in his dissenting opinion in *Dini* v. *Naiditch,* 20 Ill. 2d 406, 435, 170 N.E. 2d 881 (1960):

> "When two overlapping causes of action are made to grow where one has grown before, the possibility of double recovery is real. It cannot be obviated by the method suggested in the majority opinion [deducting from the computation of damages in the wife's consortium action any compensation given her husband in his action for the impairment of his ability to support], because there is no assurance that the wife's action will be tried first, or even that the two actions will be filed in the same court. A requirement of compulsory joinder of the two causes of action would help, but no such requirement exists."[6]

In view of the possibility of double recovery if the wife were given a consortium action, we must conclude that this case involves a permissible classification rather than an impermissible discrimination. *Krohn* v. *Richardson-Merrell, Inc.,* 406 S.W. 2d 166, 168, 169 (Tenn. Sup. Ct. 1966), certiorari denied, 386 U.S. 970; *Seagraves* v. *Legg,* 147 W. Va. 331, 127 S.E. 2d 605, 608 (1962). All federal courts

---

[6] On the other hand, the *Hitaffer* and *Karczewski* opinions, *supra,* express the view that double recovery can be avoided by deducting from the wife's damages any amount recovered by the husband for loss of earning power. See 183 F.2d at p. 819 and 274 F.Supp. at p. 173.

of appeals that have considered the subject have denied consortium rights where that is the *lex loci fori*. *Carey* v. *Foster*, 345 F. 2d 772 (4th Cir. 1965); *Igneri* v. *Cie. de Transports Oceaniques*, 323 F. 2d 257 (2d Cir. 1963; state law considered in determining maritime law), certiorari denied, 376 U.S. 949; *Criqui* v. *Blaw-Knox Corporation*, 318 F. 2d 811 (10th Cir. 1963); *Sestito* v. *Knop*, 297 F. 2d 33 (7th Cir. 1961); *Filice* v. *United States*, 217 F. 2d 515 (9th Cir. 1954); *O'Neil* v. *United States*, 202 F. 2d 366 (D.C. Cir. 1953);[7] *Werthan Bag Corp.* v. *Agnew*, 202 F. 2d 119

While we would prefer to accord the wife a consortium cause of action, it is for the Indiana legislature or judiciary to decide whether to recognize this emerging tort. It is unfitting for us to interfere in such a question of State policy under the guise of the Equal Protection clause.

The judgment of the District Court is affirmed.

SCHNACKENBERG, *Circuit Judge*, dissenting.

Josephine Miskunas, plaintiff, has appealed from a final judgment of the district court dismissing her action for loss of consortium. The action is for damages to her marriage resulting from injuries to her husband which she alleges deprived her of his "society, services, companionship and consortium". The district court held that under Indiana law a wife cannot maintain an action for loss of her husband's society, companionship, affection and conjugal relationship occasioned by personal injuries to her husband. In the district court and on appeal plaintiff has argued that that application of Indiana law, resulting in a dis-

---

[7] In *O'Neil*, decided just 3 years after its *Hitaffer* case that gave the wife an action for loss of consortium in the District of Columbia, the Court of Appeals followed Maryland law in denying the wife such an action. This indicates that *Hitaffer* was not based on the Equal Protection clause. (6th Cir. 1953). We decline to depart from this impressive array of modern authority.

missal of her complaint, violates the fourteenth amendment to the federal constitution by denying her equal protection of the law, since a husband may pursue such a remedy under Indiana law. Contrary to the view of the majority herein, I would hold that such application of the Indiana law by the district court denies plaintiff the equal protection of the law, in violation of the fourteenth amendment to the federal constitution.

1. Consortium means, *inter alia,* the marital association of husband and wife. Since the wife was considered a chattel of her husband at common law and he entitled to her services, the term connotes in addition to the right of companionship, cooperation, affection and aid, the husband's right to a wife's services, *i.e.* her wifely services. However, society since has removed the wife's disabilities existent at common law and now considers the wife a citizen equal with her husband. Indiana has in fact "emancipated" the married woman by enactment of various statutes relating to her property, services, ability to sue and to be sued, etc. (Burns Ind. Stat. ch. 38 §§ 101 to 126).

2. While the majority correctly recognizes some prevailing limitations relating specifically to women, *enacted* by the state, which deal with a woman's economic pursuits, *viz.,* hours and types of employment, see *Goesaert* v. *Cleary,* 335 U.S. 464 (1948) and *Muller* v. *Oregon,* 208 U.S. 412 (1908), the Indiana courts remain closed to a woman who seeks damages for a wrong to her, caused by the negligence of a third person which results in injury to her husband. Contrary to the fact in *Goesaert* v. *Cleary, supra,* Indiana has *enacted no statute* barring to a wife the remedy sought by plaintiff here. Involved is a court's reclassification *by sex* of a citizen's civil rights to remedy a wrong to her interests—followed by its extinction by *judicial fiat,* repugnant to constitutional principles.

Thus, in *Brown* v. *Kistleman,* 177 Ind. 692, 98 N.E. 637 (1912), the Indiana Supreme Court adopted the reasoning that, since the husband could not recover for his wife's personal damages and for his loss of consortium at com-

mon law, a wife has no cause of action or loss of consortium today. The fallacy, apparent from the opinion and now perpetuated by that court, is that at common law a wife's action for personal damages did not exist. The value of a wife to her husband was exactly her ability to earn money and render services and be helpful to others, *viz.*, his consortium. Thus we find, at 696-697:

> "The actions by husbands at common law for expenses and loss of services, in which the loss of consortium has been considered in estimating damages, were all in cases in which no damages could be awarded for loss of the ability to earn money and render services and be helpful to others, in an action by the husband and wife for the wife's personal damages, because at common law all these elements of damage belonged to the husband. * * * There was not an allowance to the wife for her loss of ability to earn wages and render services, and at the same time an allowance to the husband, in the form of compensation for the loss of consortium for the same diminution of ability to be helpful. * * * When the injury is to the person of another, the impairment of ability to work and be helpful and render services of any kind is paid for in full to the person injured."

However, the husband is permitted now to recover for loss of consortium based upon loss of "wifely" services and the wife is permitted to recover for injury to her person for the same tort. *Burk* v. *Anderson,* 232 Ind. 77, 109 N.E. 2d 407 (1952); Cf. *Ohio and Mississippi Ry. Co.* v. *Cosby, et al.,* 107 Ind. 32, 7 N.E. 373 (1886); and *P. B. Arnold Co.* v. *Buchanan,* 60 Ind. App. 626, 111 N.E. 204 (1916). In spite of this fact, where the husband is negligently injured, the wife is barred from recovery for her loss of consortium. *Boden* v. *Del-Mar Garage,* 205 Ind. 59, 185 N.E. 860 (1933). In *Boden,* the Indiana court rejected the wife's argument that the husband had an independent right of action for loss of consortium unconnected with the loss of service. At 863, it stated:

"Upon an exhaustive examination of cases in many jurisdictions we find that, wherever the husband has brought an action for damages on account of injuries to his wife by the negligence of a third party to recover for loss of service, companionship, and society of his wife, the gist of the action, and the real basis of recovery, is for the loss of service, and not the loss of consortium."

Obviously, if an action for loss of consortium may be maintained by a husband by alleging wifely services, a wife is denied equal protection of the law if she is denied the corresponding services due her as a result of coverture. The opinion in *Hitaffer* v. *Argonne Co.*, D.C. Cir., 183 F. 2d 811 (1950),[1] holding that a wife has a cause of action for loss of consortium due to a negligent injury to her husband, demonstrates this inequity, at 819:

"• • • logic, reason and right are in favor of the position we are now taking. The medieval concepts of the marriage relation to which other jurisdictions have reverted in order to reach the results which have been handed to us as evidence of the law have long since ceased to have any meaning. It can hardly be said that a wife has less of an interest in the marriage relation than does the husband or in these modern times that a husband renders services of such a different character to the family and household that they must be measured by a standard of such uncertainty that the law cannot estimate any loss thereof. The husband owes the same degree of love, affection, felicity, etc., to the wife as she to him."

---

[1] *Hitaffer* was overruled by the same court only with respect to its interpretation of the exclusivity of the remedy provided by § 5 of the Longshoremen and Harbor Workers Act—33 U.S.C. § 905. See *Smither and Company, Inc.* v. *Coles*, D.C. Cir., 242 F.2d 220 (1957), cert. den. 354 U. S. 914 (1957). Thus the relevance of *Hitaffer* to the case at bar remains unimpaired.

Relevant comments with respect to Indiana law on this subject were made by Judge Marovitz in the recent case of *Karczewski* v. *Baltimore and Ohio Railroad Co.* (D.C. N.D. Ill., 1967), 274 F. Supp. 169. At 179-180, the court concluded:

> "We believe that the instant classification by sex certainly is unrelated to any of the concerns which could motivate a distinction on that basis. As we have indicated, the intangible segments of the elements comprising the cause of action for loss of consortium are equally precious to both husband and wife. Certainly, no justification is apparent, or is offered, to affirmatively support the classification. We think, therefore, that it discriminates unreasonably and arbitrarily against women, and must be abolished.
>
> "It is not relevant to say that because all wives are similarly situated all are equally protected. For that is to ill-define the relevant classification. In these circumstances, all married people, husbands *and* wives, must comprise the class to be protected. That is because each has an equal interest in the elements of the marital relationship which are protected by the action for loss of consortium. To deny it to wives is a classification without reason, is arbitrary, and is consequently a violation of the Equal Protection Clause of the Fourteenth Amendment."

See also to the same effect, *Owen* v. *Illinois Baking Corp.* (W.D. Mich. 1966), 260 F. Supp. 820, similarly involving the Indiana law with respect to a wife's loss of consortium. To the same effect is the recent decision of the New York Court of Appeals in *Millington* v. *Southeastern Elevator Company, et al.*, case No. 169,[2] where Judge Keating said:

> "* * * the mental and emotional anguish caused by seeing a healthy, loving companionable mate turned into a shell of a person is real enough. * * * The loss of com-

[2] Not yet reported.

panionship, emotional support, love, felicity and sexual relations are real injuries. The trauma of having to care for a permanent invalid is known to have caused mental illness. There may not be a deterioration in the marital relationship, but it will certainly alter it in a tragic way. * * *"

The acceptance of this view is further indicated by the April 2, 1968 decision of the Court of Appeals of Franklin County, Ohio, Case No. 8933, *Leffler* v. *Wiley*,[3] disposing of the appeal of Mrs. Leffler who had joined with her husband in a suit for damages. The trial court held that, although a husband can recover for the loss of his wife's services and consortium, yet a wife cannot recover for the loss of her husband's loss of services and consortium. On appeal she contended that this action deprived her of equal protection of the laws.

In the *Leffler* opinion, it was said:

"* * * However, regardless of whether it be incidental or independent, the common law of Ohio does recognize loss of consortium as an item of damages recoverable by a husband.

"If a statute were to affirmatively create such a right in a husband and yet deny it to a wife, such a classification based on sex alone would violate * * * the Fourteenth Amendment to the Constitution of the United States. The common-law distinction between husband and wife in regard to consortium is equally based upon an unreasonable, discredited concept of the subservience of the wife to her husband. *The courts should not perpetuate in the common law a discrimination that could not constitutionally be created by a statute.* [Italics supplied.]

"In our opinion, loss of consortium is an item of damage to a wife exactly to the same extent as to the husband. We hold that her legal rights to recover are

[3] Not yet reported.

equal to those of her husband. The demurrer should have been overruled.

"The judgment of the Common Pleas Court will be reversed and the cause remanded for further proceedings."

In view of Indiana's patent discrimination, it was error for the district court in the case at bar to dismiss plaintiff's complaint. I can find no justification in reason or law for this unjust result. Accordingly, I would reverse the judgment of the district court, and grant plaintiff a trial upon the merits of her complaint.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Tuesday, September 10, 1968

Before

Hon. Latham Castle, Chief Judge
Hon. J. Earl Major, Sr. Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. John S. Hastings, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Otto Kerner, Circuit Judge

Josephine Miskunas Plaintiff-Appellant No. 16482 vs. Union Carbide Corporation, a New York Corporation Defendant-Appellee	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

It Is Ordered by the Court, En Banc, that the petition for rehearing en banc in this cause be and the same is hereby denied.